IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WILLIAM HAMILTON,	)	
	)	
Plaintiff,	)	
	)	**CIVIL ACTION**
v.	)	
	)	**No. 04-2264-CM**
BRAD SYSTEMS, INC. and LAWRENCE PAPER COMPANY,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

Plaintiff William Hamilton filed his complaint on June 4, 2004, alleging that defendants terminated his employment in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621, *et seq*. This matter comes before the court on defendants BRAD Systems, Inc. ("BRAD")[1] and Lawrence Paper Company's ("LPC") Motion for Summary Judgment (Doc. 53).

I. Facts[2]

A. The Parties

LPC is a Kansas corporation that makes corrugated shipping containers, i.e. boxes, at its manufacturing plant in Lawrence, Kansas. In business since 1882, LPC currently has its

[1] A third defendant, BRAD Systems, was named in plaintiff's complaint. However, from the pleadings, including the pretrial order entered in this case, it appears the proper defendant is BRAD Systems, Inc. Accordingly, the court makes no reference to the BRAD Systems defendant that is separately listed on the docket sheet for this matter.

[2]The court construes the facts in the light most favorable to plaintiff as the nonmoving party pursuant to Fed. R. Civ. P. 56.

headquarters and box manufacturing plant at 2801 Lakeview Road, Lawrence, Kansas. LPC has more than eight hundred customers and currently employs about 240 people. The workforce at LPC's box factory in Lawrence is primarily hourly, unionized workers. The terms and conditions of employment for the union workers are governed by a collective bargaining agreement. LPC's administrative employees and the employees who work in Perry, Kansas, at the Packaging Café, and at Lakeview Business Center are not unionized.

Although the core of LPC has always been the manufacture of corrugated boxes, LPC also offers other products and services. LPC has at least five separate divisions or entities, including: Packaging Café, defendant BRAD (which is a subsidiary corporation with LPC as the sole owner), Perry Manufacturing, Jayhawk Boxes, Inc. (also a subsidiary corporation with LPC as the sole owner), and Lakeview Business Center. Alan Hill served as the president of LPC from the 1970s until his death on October 30, 2004. Since that time, Justin Hill[3] has been the president of LPC. Previously, dating back to the 1970s, Justin Hill was the secretary-treasurer of LPC.

Until Alan Hill's death, he and Justin Hill were on the boards of directors of both BRAD and LPC. However, Alan Hill never managed BRAD. Alan Hill did own part of BRAD and ratified plaintiff's hiring as vice president of BRAD.

BRAD is a Kansas corporation with offices in Lawrence, Kansas, at 2901 Lakeview Road, a stand alone building down the street from the LPC box factory. LPC formed BRAD in 1984, in part to insulate LPC from potential liability that ownership of its software systems might cause as that software was marketed and sold to outside customers. BRAD provides clients with software solutions and computer consulting support services. The array of services BRAD provides includes,

[3] Alan Hill and Justin Hill are brothers.

but is not limited to: (1) writing and developing software; (2) operating hotline support for its software; (3) assisting in the selection of new hardware and software; (4) assisting in the set up and maintenance of its customers' networks; and (5) serving as an application service provider. Although BRAD markets the same software to all potential customers, customers can pick and choose from the software components and services offered. As a result, the work BRAD performs for customers varies according to the needs of each customer.

As of March 19, 2003, BRAD's workforce consisted of eight people: plaintiff, Justin Hill, David Stutenroth, Mary Martin, Patricia Field Valyer, Gary Martin, Susan Pearson and Greg Kahnk. Justin Hill is BRAD's president and has been since BRAD was incorporated in 1984. BRAD employed plaintiff as vice president from 1984 until March 19, 2003, when he was terminated. Stutenroth, M. Martin, Valyer, G. Martin, Pearson and Kahnk each held the position of systems developer.

The systems developers each work in a cubicle. The systems developers do not supervise anyone. Systems developers' duties include writing programming code, creating and updating software programs, responding to hotline problems and otherwise doing anything necessary to support the end user. Within that general description, the focus of individual systems developers varies. For example, individual systems developers tend to form a relationship with a specific client, which results in the systems developer fielding more direct inquiries from that client and working on the types of issues important to that client. The issues that are important to clients differ between clients and change over time.

The compensation package of the systems developers consists of a salary and an annual bonus. Systems developers also can receive a bonus for working in the field, such as work onsite at a client's location. Systems developers do not receive a commission based on BRAD's sales or a

company car. In 2002, the total compensation packages of systems developers ranged from approximately $54,000 to $72,000.

Plaintiff originally was hired by LPC in 1984; at that time, BRAD did not exist. Plaintiff was hired to serve as BRAD's vice president once BRAD began operating later in 1984. As BRAD's vice president, plaintiff was a management employee and ran BRAD's day-to-day operations. He assigned duties to the systems developers and was responsible for their development and supervision. Plaintiff also worked on sales efforts and was in charge of installations when BRAD sold software. Plaintiff had oversight of computer operations, configured new hardware, and was responsible for disaster recovery. Plaintiff also states that he was an RPG programmer, systems analyst and software developer, phrases which he describes as broad terms for data processing.

Except for periodic oversight by Justin Hill, plaintiff worked without supervision or direction. Each day he would decide what BRAD needed to accomplish in light of customer needs, the developmental needs of his staff at BRAD and the unfinished problems from the day before. Plaintiff consulted with Justin Hill on anything that plaintiff thought Justin Hill needed to know, but otherwise Justin Hill left plaintiff alone. Plaintiff contends that, from time-to-time, he was required to work in LPC's shipping department. Defendants contend that all of plaintiff's on-site work at LPC was linked to the computer services that BRAD provided to LPC.

As vice president, plaintiff's compensation package consisted of a salary, annual bonus, commission on certain sales by BRAD, and a company car. The company car was purchased by BRAD and titled in BRAD's name. In 2002, plaintiff's compensation package totaled approximately $145,000. BRAD set and paid all of plaintiff's compensation and the compensation of all of its employees.

B. Relationship Between LPC and BRAD

LPC and BRAD are separately incorporated. BRAD has its own bank accounts in which its revenues are deposited. BRAD has its own payroll account which it uses to pay its employees. BRAD operates on its own budget without any oversight from LPC. BRAD does not share a line of credit with LPC. BRAD maintains its own general ledger, monthly statements, accounts payable and receivable system and fixed assets.

From 1984 to 1989 or 1990, BRAD was housed in LPC's data processing division. Although BRAD has been physically separate from LPC since 1989 or 1990, LPC and BRAD share the same mailing address. LPC and BRAD employees participate in the same group health insurance plan and the same pension plans, all of which are in LPC's name. LPC's personnel department administers the health insurance and pension plans for both LPC and BRAD. LPC's personnel department has no role in BRAD's hiring, firing, compensation, discipline, or other employment decisions.

BRAD and LPC also conduct business with each other. For example, BRAD pays a monthly fee to LPC to purchase accounting services from LPC's accounting department. BRAD also pays LPC a flat monthly fee plus additional charges for long distance calls for use of LPC's switchboard. BRAD and LPC each have their own telephone numbers. BRAD leases office space from LPC, paying $2,400 per month in rent.

LPC has always been, and continues to be, BRAD's largest and most important customer. BRAD also has other customers, including Smurfit-MBI, Integrated Packaging and Rauch Industries (formerly Pumpkin Masters). Only Rauch is a customer of both BRAD and LPC. LPC uses a wide array of services from BRAD. For example, LPC uses BRAD's software to run LPC's box manufacturing plant. BRAD provides LPC with full support for that software, including responding to a variety of hotline requests called in or e-mailed by LPC personnel. LPC also out-sources to

BRAD the maintenance of LPC's computer systems. In essence, LPC has retained BRAD to provide whatever services LPC requires.

In return for the services that it receives from BRAD, LPC cuts an electronic check and sends it to BRAD each of the first four weeks of each month. In 2002, each of those forty-eight payments from LPC to BRAD was for $14,000, or $672,000 for the year, far more than BRAD received from any other customer.

Plaintiff contends that LPC paid whatever BRAD demanded for its services. Defendants contend that, since 2000, the amount of money LPC has paid to BRAD has changed only twice. Both times, the amount was changed to reflect changes in the amount of work BRAD was performing for LPC. In 2000, both LPC and other customers of BRAD demanded increased services from BRAD. In exchange for the increased level of work, BRAD and LPC agreed to an increase in LPC's payments from $11,000 a week (for the first four weeks of each month) to $14,000. Payments continued at that level until April 2003, when LPC cut back on its use of BRAD's services. As a result, LPC and BRAD agreed to decrease each $14,000 payment to $12,000. Plaintiff did not participate in the negotiations that established either the $14,000 or $12,000 payments.

Plaintiff contends that, during his employment, BRAD's systems developers were required to replace and do work for LPC's employees who were on leave. Defendants contend that BRAD's systems developers provide back-up coverage for certain LPC employees from time to time, such as in the payroll clerk position, but that such coverage is pre-arranged between LPC and BRAD, and LPC pays BRAD for that service. During plaintiff's employment, LPC employees would call the computer support hotline, and plaintiff would teach them how to use the computer system when doing their work. Likewise in the course of responding to hotline questions, plaintiff would explain to LPC employees how to use the software to do their job more effectively. A few times, Justin Hill

asked plaintiff about different people's job performance within LPC, as plaintiff had contact with them. However, plaintiff did not supervise anyone at LPC.

Justin Hill makes all of the hiring decisions at BRAD and sets the compensation for BRAD's employees. Two of BRAD's current employees, Pearson and Khank, originally worked for LPC. In the late 1990s, BRAD had several openings, and plaintiff and Justin Hill reviewed the possible candidates. Justin Hill hired Pearson and Khank away from LPC to work for BRAD.

Because of the parent-subsidiary relationship between BRAD and LPC, the companies work together in certain areas. For example, the annual financial statements of BRAD and LPC are consolidated as is required by generally accepted accounting principles. Consistent with ERISA, LPC's pension plan and health insurance plan covers not only LPC's employees, but also the employees of LPC's two subsidiaries: BRAD and Jayhawk Boxes, Inc. Related to this, when an employee of BRAD leaves BRAD, the personnel department at LPC provides the BRAD employee with the paperwork explaining benefits, COBRA and other separation information.

Defendants contend that BRAD reserves to itself, however, all decisions about hiring, firing, discipline, work schedules, work hours and compensation. Justin Hill, as BRAD's president, is the only person with authority to terminate BRAD employees. Neither LPC's personnel department nor anyone else at LPC is involved in such decisions. No one at LPC controls or directs the duties of BRAD's employees, although if LPC had a concern about an employee, BRAD would certainly take into consideration the views of its largest customer, as it would any of its customers.

Plaintiff testified that, in his perspective, "[f]rom a day-to-day operational point-of-view, there was no difference between BRAD Systems and LPC. We operated as, you know, one big company." Plaintiff further testified that LPC and BRAD "were so intertwined, daily operational,

that there was no noticeable difference." Defendants contend that BRAD and LPC maintained the integrity of their separate corporate identities.

C. Events Leading to the March 2003 Reductions in Force at LPC and BRAD

From 2000 through 2002, LPC experienced a prolonged, significant and sustained drop in its business. In 2000, LPC had net sales of $44,502,888. In 2001, net sales dropped to $41,051,723. Following the terrorist attacks on September 11, 2001, the slide accelerated (as measured by both percentage drop and change in actual dollars). In 2002, net sales totaled $37,439,798. In short, from 2000 to 2002, LPC's net sales dropped more than $7,000,000.

Plaintiff contends that defendants have overstated the alleged financial difficulties by focusing only on net sales. Plaintiff contends that, at the same time, LPC had a corresponding reduction in "cost of sales" of approximately $5,488,000. Plaintiff thus contends that LPC's gross profit declined by only about $1,575,000. However, as defendants point out, plaintiff is a lay witness, and his opinion regarding whether LPC's decline in sales was significant, whether it was $7 million or $1.5 million, is irrelevant.

Moreover, although plaintiff has pointed out that LPC, in conjunction with its subsidiaries, realized an overall increase in net worth of approximately $654,000 between 1998 and 2002, defendants contend that LPC's management and board of directors did not assess its financial condition by the total assets of LPC and all of its subsidiaries. LPC's management and board of directors did not view that as an accurate gauge of how LPC itself was performing. Rather, each division and subsidiary of LPC was expected to be profitable on its own. In late 2002 and early 2003, LPC's management was focused on and concerned by the declining pretax income from LPC's box manufacturing operations. LPC's management measures performance based on pretax income because it focuses entirely on the company's performance. Use of pretax income avoids factors

influencing income tax expense such as differing tax rates, tax incentives such as credits and the manner in which tax losses must be accounted for, which may not be related to the company's operating performance. In fact, LPC's income before taxes in 2000 was approximately $1,446,000; $960,000 in 2001; with a loss of $759,000 in 2002.

In their capacity as the board of directors of LPC, Alan Hill and Justin Hill began discussions in fall 2002 about reducing overhead and otherwise cutting costs in order to keep LPC from losing so much money. They decided to hold off on any decisions, hoping that the market would start to turnaround. Once the 2002 year-end financial numbers became clear, however, LPC could wait no longer. Alan Hill began meeting with various department managers at LPC and LPC's internal accountant, Jim Mowder. The subject of those meetings was what positions could be eliminated without crippling LPC's operations. Through those meetings, Alan Hill and the LPC department heads determined what positions at LPC would be reduced. Eventually, on March 19 and 20, 2003, forty-one LPC employees lost their jobs when their positions were eliminated in a reduction in force.

LPC also examined whether it could achieve cost savings by reducing payments to its vendors. LPC specifically examined the services it was receiving from BRAD. Some of the work BRAD was performing for LPC was research and development work that was not critical to LPC's day-to-day operations. LPC determined that it could save money by cutting its payment to BRAD and forgoing the research and development work. In April 2003, the month following the reductions in force, LPC and BRAD agreed to decrease each of LPC's forty-eight weekly payment to BRAD from $14,000 to $12,000, achieving a cost savings of $96,000 a year for LPC.

By the end of 2002, BRAD also was losing money. Its pretax income for 2002 was a loss of about $48,500. During 2000 to 2002, BRAD's dependence on LPC as its largest customer and source of income increased. In 2000, revenue to BRAD from customers other than LPC totaled

$235,287. That number decreased to $129,734 in 2001 and to $49,974 in 2002. Thus, from 2000 to 2002, revenue to BRAD from customers other than LPC dropped 78%. By the end of 2002, BRAD was posting a loss and was increasingly reliant on LPC. In turn, the cost savings measures that LPC was taking had a correspondingly negative impact on BRAD. Specifically, after ending 2002 with a net income loss of $48,500, BRAD faced the further $96,000 annualized reduction of revenue in 2003. Although the reduction in LPC's payment to BRAD did not begin until April 2003, BRAD knew in January or February of 2003 that a decrease was coming. Moreover, BRAD knew that the reduction in revenue from LPC would result in financial trouble for BRAD, based on its dependence on income from LPC.

In anticipation of the decrease, Justin Hill worked in the weeks leading up to March 19, 2003, to find approximately $200,000 in cost savings, an amount that Justin Hill and Alan Hill (who together composed BRAD's board of directors) decided in the exercise of their business judgment was necessary to address BRAD's financial circumstances and position it for the future. To achieve that savings, Justin Hill decided to conduct a reduction in force at BRAD. In selecting what positions to eliminate, Justin Hill made a business decision of what positions could be eliminated without crippling BRAD's operations and ability to serve its customers.

As a result, Justin Hill decided not to fill a systems developer position, which had been vacated when David Hough retired effective March 14, 2003. By eliminating that position, BRAD saved about $68,000-$70,000, the value of Hough's compensation package (salary and annual bonus). Justin Hill determined that, because the amount of work for which BRAD was engaged had been decreasing and was expected to decrease further, BRAD could get by with one less systems developer. More than two years have passed since the March 2003 reductions. In that time, BRAD

has not hired any systems developer or any other employees. Defendant contends that, even with one less systems developer, the workload on the remaining systems developers has not increased.

Justin Hill also decided to eliminate plaintiff's vice president position. Justin Hill concluded that elimination of the vice president position would save $145,000 per year (the value of plaintiff's compensation package in 2002) and have the least impact on BRAD's ability to serve its customers. Justin Hill had performed the duties of the vice president position before plaintiff was hired, believed he could do so again, and believed that BRAD could function without a vice president. Since March 19, 2003, BRAD has operated without a vice president.

D. Plaintiff's Termination and Exit Interview

Plaintiff was the only employee ever terminated by BRAD between 1984 and 2003. On March 19, 2003, Justin Hill, who is eight months older than plaintiff, and Mowder met with plaintiff and explained that he was being terminated. Plaintiff was fifty-seven years old at that time. At that time, plaintiff was the oldest, most senior and highest-paid employee next to Justin Hill, BRAD's president. It is undisputed that, at the time of his termination, plaintiff was busy on a daily basis.

Prior to the meeting, plaintiff was unaware of the plan to eliminate his position as part of a reduction in force. During the meeting, plaintiff asked if he could keep his job or take another position at a reduced salary. Justin Hill declined that request. Justin Hill had decided which positions at BRAD were going to be eliminated before meeting with plaintiff. Justin Hill testified that plaintiff thanked him for the opportunity to work for him and noted that plaintiff had always been treated fairly, although plaintiff testified that he does not recall making those remarks. Plaintiff also asked if he could purchase the company car he was using. BRAD eventually sold the car to plaintiff at a wholesale cost.

During the meeting, Justin Hill gave plaintiff a memorandum, dated March 19, 2003, on LPC's letterhead, outlining plaintiff's separation benefits. The memorandum states: "This memo will confirm our conversation of today in which we advised you that, as a result of a reduction-in-force, your employment with Lawrence Paper Company is being terminated effective today." The memorandum was a form document that plaintiff and each of the forty-one employees of LPC who were laid off received. Jerry Pope, the director of LPC's personnel department, created the form letter, which provides a summary of the pay and the benefits derived from LPC's employee benefit plans, which are extended to employees of BRAD and Jayhawk Boxes, Inc. Due to LPC's administration of those plans, the form document was on LPC letterhead. Pope created the form letters on the evening of March 18, 2003 or the morning of March 19, 2003. However, Justin Hill had made the decision to eliminate BRAD's vice president position at least a week before then. Pope did not participate in that decision and did not know why Justin Hill made it. In fact, no one in LPC's personnel department participated in the decision to terminate plaintiff's employment.

Defendants contend that it was appropriate for plaintiff to receive the form letter because LPC's personnel department administers certain benefits offered to BRAD employees. However, defendants contend that the statement that plaintiff's employment with LPC was being terminated was a typographical error. That clause is correct for the forty-one employees of LPC who were laid off. With respect to plaintiff, defendants claim that phrase is a typo caused by the use of a form letter to explain separation benefits. Plaintiff has admitted that he was not employed by LPC and that BRAD alone employed him and set and paid his compensation.

Following plaintiff's termination, Justin Hill gave plaintiff a letter of recommendation stating that plaintiff "was not let go because his performance was in any way unsatisfactory."

E. Performance of Plaintiff's Duties Since His Termination

Plaintiff does not know who is performing his former duties, if anyone. In fact, the duties that plaintiff performed have either been assumed by Justin Hill or are not being performed at all. Since March 19, 2003, Justin Hill alone assigns duties to the systems developers and is responsible for their development. Justin Hill alone works on sales efforts to promote BRAD's products. BRAD has not made any software sales since March 19, 2003, but Justin Hill alone is soliciting potential new customers. Since March 19, 2003, Justin Hill alone has had oversight of computer operations and is responsible for disaster recovery.

In Justin Hill's view, plaintiff had not been actively programming for many years prior to his termination, and Justin Hill did not believe that plaintiff could replace a systems developer because his skills were too rusty. The other systems developers support Justin Hill's position that plaintiff had not been actively programming for many years prior to his termination. Moreover, to whatever extent that plaintiff had configured new hardware or worked in data processing as an RPG programmer, systems analyst or software developer, no one has assumed plaintiff's work after his termination. Since March 19, 2003, the type of duties performed by systems developers has not changed. The systems developers' workload has not changed beyond that dictated by changes in client demands. None of the systems developers have assumed any work or any project previously done by plaintiff.

II. Summary Judgment Standard

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In applying this standard, the court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664,

670 (10th Cir. 1998) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

III. Analysis

As an initial matter, defendants have raised the issue of whether plaintiff has met the jurisdictional prerequisites to bring a claim under the ADEA. Specifically, defendants contend that LPC was not plaintiff's employer, and BRAD, plaintiff's employer, had only eight employees at all relevant times and thus does not meet the definition of an employer under the ADEA.

The ADEA does not apply to employers with less than twenty employees. 29 U.S.C. § 630(b). Thus, plaintiff cannot maintain an ADEA claim against BRAD alone. Although LPC qualifies as an employer covered by the ADEA, defendants contend that LPC did not employ plaintiff. Plaintiff admits that he worked for BRAD, but plaintiff contends that BRAD and LPC were either "joint employers" or a "single employer," and thus he has standing to bring an ADEA claim.

In addressing this jurisdictional issue, the Tenth Circuit has held that "the 'single employer' or 'integrated-enterprise' test is of a threshold jurisdictional issue that must be resolved under Fed. R. Civ. P. 12(b)(1) rather than under summary judgment analysis." *Calvert v. Midwest Restoration Servs.*, 35 Fed. Appx. 798, 801 (10th Cir. 2002) (citing *Scarfo v. Ginsberg*, 175 F.3d 957, 961 (11th Cir. 1999)). In fact, unless plaintiff can demonstrate that his employer had twenty or more employees, the ADEA will not apply to his claim, and this court has no jurisdiction over plaintiff's

claim.[4] Accordingly, the court applies the 12(b)(1) standards[5] to this aspect of the parties' arguments.

> When faced with factual disputes regarding subject matter jurisdiction, the district court serves as the fact-finder and may weigh the evidence, provided that the challenge to subject matter jurisdiction does not implicate an element of the cause of action. Because subject matter jurisdiction addresses the power of a court to hear a case, a jury does not resolve factual issues regarding subject matter jurisdiction. Instead, that duty is for the court.

Scarfo, 175 F.3d at 961 (citing Fed. R. Civ. P. 12(b)(1)); *see also Calvert*, 35 Fed. Appx. at 802 n.2 (concurring with *Scarfo* that "[w]here 12(b)(1) analysis is concerned, however, the district court is permitted to resolve factual disputes and to reach a disposition on the ultimate issue in spite of conflicting evidence").

A. Single Employer

"A plaintiff who is the employee of one entity may seek to hold another entity liable by arguing that the two entities effectively constitute a single employer." *Bristol v. Bd. of County Comm'rs of the County of Clear Creek*, 312 F.3d 1213, 1218 (10th Cir. 2002). "[T]he single-employer test asks whether two nominally separate entities should in fact be treated as an integrated enterprise, while the joint-employer test assumes that the two alleged employers are separate

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[4] Plaintiff brought his age discrimination claim solely under the ADEA, claiming federal question jurisdiction pursuant to 28 U.S.C. § 1331.

[5] Federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so. *Castaneda v. I.N.S.*, 23 F.3d 1576, 1580 (10th Cir. 1994). A court lacking jurisdiction must dismiss the case at any stage of the proceeding in which it becomes apparent that jurisdiction is lacking. *Scheideman v. Shawnee County Bd. of County Comm'rs*, 895 F. Supp. 279, 280 (D. Kan. 1995), *citing Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974); Fed. R. Civ. P. 12(h)(3). As the party seeking to invoke federal jurisdiction, plaintiff bears the burden of establishing that such jurisdiction is proper. *Basso*, 495 F.2d at 909. When federal jurisdiction is challenged, plaintiff bears the burden of showing why the case should not be dismissed. *Jensen v. Johnson County Youth Baseball League*, 838 F. Supp. 1437, 1439-40 (D. Kan. 1993).

entities." *Id*. (citing *Clinton's Ditch Coop. Co. v. NLRB*, 778 F.2d 132, 137-38 (2d Cir. 1985). Thus, if BRAD and LPC are considered a "single employer" or an "integrated enterprise," then LPC's employees may be included for purposes for the twenty employee requirement of the ADEA. *See Calvert*, 35 Fed. Appx. at 801 (applying single employer or integrated enterprise test in Title VII context); *see also Tatum v. Everhart*, 954 F. Supp. 225, 228 (D. Kan. 1997) (applying integrated enterprise test in Title VII and ADEA contexts).

"Courts applying the single-employer test generally weigh four factors: '(1) interrelation of operation; (2) common management; (3) centralized control of labor relations; and (4) common ownership and financial control.'" *Bristol*, 312 F.3d at 1220. The third factor, centralized control of labor relations, is generally considered the most important. *Id*. However, "'[a]ll four factors . . . are not necessary for single-employer status. Rather, the heart of the inquiry is whether there is an absence of an arm's length relationship among the companies.'" *Calvert*, 35 Fed. Appx. at 802 (quoting *Knowlton v. Teltrust Phones, Inc.*, 189 F.3d 1177, 1184 (10th Cir. 1999)). In this case, putting plaintiff's unsupported speculation and assumptions aside, the court finds insufficient evidence in the record to treat BRAD and LPC as a single employer.

1. Interrelation of Operation

In analyzing this factor, the court looks to whether BRAD and LPC have common indications of interrelated operations, such as joint bookkeeping and payroll, shared office space and equipment, common employees, identical or heavily overlapping management, board of directors and company presidents, *Sandoval v. City of Boulder, Colo.*, 388 F.3d 1312, 1322 (10th Cir. 2004), or combined payroll records, bank accounts, lines of credit, switchboards, or telephone numbers, *Tatum*, 954 F. Supp. at 228.

In this case, BRAD and LPC are separately incorporated, which creates a strong presumption that LPC was not plaintiff's employer. *See id.* at 229 (citing *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1362 (10th Cir. 1993) (where entities are separately incorporated, the limited liability doctrine "creates a strong presumption that a parent is not the employer of its subsidiary's employees . . . .")). BRAD provides clients with software solutions and computer consulting support services, while LPC makes corrugated shipping containers.

The record demonstrates that BRAD has separate bank accounts, a separate payroll account, and maintains its own general ledger, monthly statements, accounts payable and receivable system and fixed assets. BRAD operates its own budget without any oversight from LPC and does not share a line of credit with LPC. BRAD pays a monthly fee to LPC to purchase accounting services from LPC's accounting department. BRAD pays LPC a flat monthly fee plus additional charges for long distance calls for use of LPC's switchboard, but BRAD and LPC each have their own telephone numbers. BRAD also has leased office space from LPC for more than a decade. BRAD's office space is physically separate from LPC. BRAD and LPC have completely different employees, although some BRAD employees (systems developers) occasionally fill-in for LPC employees pursuant to a contractual agreement with LPC, which is one of BRAD's biggest customers. At the time of plaintiff's employment, BRAD and LPC had no common management and different company presidents.

Because of the parent-subsidiary relationship between BRAD and LPC, the companies consolidate their annual financial statements as is required by generally accepted accounting principles. However, the consolidated statements and the separate accounts payable and receivable systems reflect the payments that BRAD makes to LPC for office space, accounting services, switchboard use, and the payments that LPC makes to BRAD for customer products and services.

Consistent with ERISA, LPC's personnel department administers the pension plan and health insurance plan for LPC's employees and the employees of LPC's two subsidiaries: BRAD and Jayhawk Boxes, Inc. Thus, when an employee of BRAD leaves BRAD, LPC's personnel department provides the BRAD employee with the paperwork explaining benefits, COBRA and other separation information. LPC's personnel department serves no other role with regard to BRAD employees.

In sum, although it is clear that LPC and BRAD pay each other for services and have a parent-subsidiary relationship, there is no strong indication in the record that the companies have interrelated operations.

2. Common Management

This factor "examines whether the two entities have common directors and officers." *Tatum*, 954 F. Supp. at 229. The record reflects that, at the time of plaintiff's employment, BRAD and LPC had no common management and different company presidents. While Alan and Justin Hill comprised the boards of directors of both entities, there is no evidence that Alan Hill had any influence in Justin Hill's decision to eliminate plaintiff's position, or that anyone at LPC had any role in other hiring and termination decisions at BRAD.

3. Centralized Control of Labor Relations

To establish this most important factor:

> "[T]he parent corporation's control of the day-to-day employment decisions of the subsidiary must be shown. Day-to-day control must actually be exercised; potential control is not sufficient. Courts have found centralized control when the parent was involved in the subsidiary's hiring decisions, when a common officer had approved all hiring decisions of the subsidiary, and when the parent has issued personnel policies and also fired at least one subsidiary employee. The Tenth Circuit has emphasized the importance of a plaintiff's actual experience as an employee with respect to whether the parent corporation hired the plaintiff, fired the plaintiff, or supervised the plaintiff's work on a regular, daily basis."

Tatum, 954 F. Supp. at 229 (quoting *Eichenwald v. Krigel's Inc.*, 908 F. Supp. 1531, 1541 n.9 (D. Kan. 1995)).

The record in this case establishes that BRAD established and provided compensation for all of its employees, including plaintiff. Plaintiff had control over his daily activities, and reported to Justin Hill as needed regarding on-going work. Although LPC had control of certain aspects of BRAD's workflow as BRAD's customer during plaintiff's employment, there is no evidence in the record that LPC or any member of LPC's management had oversight over BRAD employees' work, had any authority to discipline BRAD employees or had any authority to terminate BRAD employees during plaintiff's employment. In fact, LPC contracted with BRAD to use BRAD's systems developers as fill-ins when certain of its employees were gone, but LPC did not serve as an employer to those BRAD employees who filled in. Rather, the arrangement was contractual, with BRAD employees working in the field at a customer site.

To the extent that LPC's personnel department interacted with BRAD employees, it was solely as administrator of the pension and benefits plans for both companies. Although Alan Hill and Justin Hill both served on the boards of directors of LPC and BRAD, Alan Hill was LPC's president, and Justin Hill was BRAD's president. Justin Hill did not become LPC's president until his brother's death in 2004, a year after plaintiff's termination of employment. Moreover, the facts before the court demonstrate that Justin Hill made the hiring and termination decisions at BRAD. When both companies were looking at eliminating positions in 2003, Alan Hill worked with LPC's management on a reduction in force, while the record reflects that Justin Hill did all of the cost analysis and made the decisions on what positions to eliminate and not re-fill at BRAD.

Although plaintiff points to the March 19, 2003 memorandum on LPC's letterhead stating that his employment with LPC had been terminated, the court finds defendants' explanation of the

memorandum credible. Plaintiff received one of the memorandums solely as an explanation of his post-termination benefits that were administered by LPC's personnel department, and the form language in his letter was not altered to reflect his employment with BRAD. The court finds no evidence in the record that there was any centralized control of labor relations between LPC and BRAD or that LPC had day-to-day control over BRAD's operations.

4. Common Ownership and Financial Control

Even though LPC is the sole shareholder of BRAD, "'mere existence of a parent-subsidiary relationship is not enough to impose liability on the parent.'" *Frank*, 3 F.3d at 1364 (quoting *Wood v. S. Bell Tel. & Tel. Co.*, 725 F. Supp. 1244, 1249 (N.D. Ga. 1989)). In fact, "[t]he doctrine of limited liability creates a strong presumption that a parent company is not the employer of its subsidiary's employees, and the courts have found otherwise only in extraordinary circumstances." *Id*. at 1362. The court finds this factor insufficient, in and of itself, to establish that LPC and BRAD operated as a single employer during plaintiff's employment, especially in light of the lack of evidence in support of the other three factors.

Accordingly, plaintiff has failed to establish that LPC and BRAD should be treated as a single employer for ADEA purposes.

B. Joint Employers

Plaintiff alternately claims that LPC and BRAD were joint employers. Two entities are joint employers "'if the entities share or co-determine those matters governing the essential terms and conditions of employment. In other words, courts look to whether both entities exercise significant control over the same employees.'" *Sandoval*, 388 F.3d at 1323 (quoting *Bristol*, 312 F.3d at 1218). The joint employment determination is "employee-specific." *Id.* at 1324. Thus, "'[w]hen a worker is formally employed by one organization, but important aspects of his work are subject to control by

another organization, both organizations are employers of the worker.'" *Id.* (quoting *Sizova v. Nat'l Inst. of Standards & Tech.*, 282 F.3d 1320, 1330 (10th Cir. 2002)). The most important component of the "the terms and conditions of an employment relationship is the right to terminate it under certain circumstances." *Id.* (quoting *Bristol*, 312 F.3d at 1219).

In this case, the court finds no evidence that LPC controlled important aspects of plaintiff's work. Plaintiff certainly worked closely with LPC, as it was BRAD's biggest customer during plaintiff's employment. However, the record establishes that plaintiff himself ran BRAD's day-to-day operations. He assigned duties to the systems developers and was responsible for their development and supervision. Plaintiff oversaw computer operations, configured new hardware, and was responsible for disaster recovery. In fact, except for periodic oversight by Justin Hill, plaintiff managed BRAD's work and all of its employees without supervision or direction. Plaintiff consulted with Justin Hill on anything that plaintiff thought Justin Hill needed to know, but otherwise Justin Hill left plaintiff alone.

As BRAD's president, Justin Hill made all of the hiring and termination decisions at BRAD during plaintiff's employment. Justin Hill made the decision to terminate plaintiff's employment and eliminate the vice president position at BRAD.[6] There is no evidence that LPC set the terms and conditions of plaintiff's employment (or of any other employee at BRAD) or that LPC had any share in those determinations. In light of plaintiff's autonomy in his position at BRAD, and the complete lack of evidence that LPC controlled the essential terms and conditions of his employment, the court finds no existence of a joint employer relationship between BRAD and LPC.

[6] *See* the prior fact sections and single employer analysis section for a more detailed discussion of the March 19, 2003 memorandum that plaintiff claims demonstrates his employment was terminated by LPC and not by BRAD.

Because plaintiff has failed to establish either that LPC and BRAD acted as a single employer or that they were joint employers, the court must dismiss plaintiff's ADEA claim for lack of subject matter jurisdiction. *See Calvert*, 35 Fed. Appx. at 802; *Tatum*, 954 F. Supp. at 230.[7]

IT IS THEREFORE ORDERED that defendants BRAD Systems, Inc., and Lawrence Paper Company's Motion for Summary Judgment (Doc. 53) is granted. Plaintiff's case is hereby dismissed for lack of subject matter jurisdiction.

Dated this 24th day of March 2006, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

[7] Because the court does not have jurisdiction over plaintiff's ADEA claim, the court does not address the substance of plaintiff's age discrimination allegations.